No. 12523

United States
Court of Appeals
For the Ninth Circuit.

OSCAR EWING, Federal Security Administrator,

Appellant,

vs.

ARCHIE F. McLEAN,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

JOHN A. CARVER,

United States Attorney,
District of Idaho,

PAUL S. BOYD,

Asst. United States Attorney,
District of Idaho,

P. O. Box 1776,
Boise, Idaho.

MARSHALL CHAPMAN,

P. O. Box 309,
Twin Falls, Idaho,

Attorneys for Appellee.

District Court of the United States for the District of Idaho, Southern Division

No. 2593

ARCHIE F. McLEAN,

Plaintiff,

vs.

OSCAR EWING,

Defendant.

COMPLAINT

Comes Now, the plaintiff above named and complains of the defendant above named, and for cause of action alleges:

I.

That the plaintiff, Archie F. McLean, is a resident of the State of Idaho and resides in the District of Idaho, Southern Division, District Court of the United States, hereinabove set forth.

II.

That the defendant, Oscar Ewing, is the duly appointed qualified and acting Federal Security Administrator charged with the duty of administering what is commonly known as the Social Security Act.

III.

That the plaintiff, Archie F. McLean, earned during the calendar quarter ending December 31, 1941, the sum of One Hundred Ten and 25/100 ($110.25) Dollars; during the calendar quarter end-

ing March 31, 1942, the sum of Two Hundred Fifty-seven and 33/100 ($257.33) Dollars; during the calendar quarter ending June 30, 1942, the sum of One Hundred Forty-one and 35/100 ($141.35) Dollars; during the calendar quarter ending September 30, 1942, the sum of One Hundred Thirty-three and 12/100 ($133.12) Dollars, and during the calendar quarter ending December 31, 1942, the sum of Three Hundred Fifty-six and 98/100 ($356.98), and during which time said plaintiff was employed by Albert Miller and Company at Burley, Idaho, and that the services rendered by plaintiff to said Albert Miller and Company during the periods aforesaid, were as follows:

(a) Feeding potatoes into sorter and washer;

(b) Working on sorting table;

(c) Removing bags from sorting machine, and

(d) Assisting in loading railroad freight cars and assisting in loading trucks and other vehicles from warehouse.

IV.

That plaintiff performed four full quarters of work for and on behalf of the Albert Miller and Company at its Burley warehouse, and in addition to the services rendered by plaintiff to said Albert Miller and Company, said plaintiff performed services for other employers, which employment was covered by the Social Security Act, constituting thirteen (13) quarters on the 20th day of Novem-

ber, 1945, at which time plaintiff ceased to be employed, and that upon said date plaintiff was eligible to the benefits of the Social Security Act.

V.

That plaintiff thereafter made application to the Social Security Administration for the benefits accruing to plaintiff under the provisions of the Social Security Act by reason of the employment of plaintiff for a period of seventeen (17) quarters prior to ceasing his employment and after having reached the age of sixty-five (65) years; that thereafter a hearing was had upon plaintiff's application for benefits under the Social Security Act, before Martin Tieburg, Referee, on the 8th day of July, 1946, and that said Referee held that plaintiff was not entitled to receive the benefits of the Social Security Act for the reason and upon the ground that the services performed by plaintiff for the Albert Miller and Company was excepted from the Social Security Act under the provisions of Section 209 (1) (4); that thereafter, plaintiff requested for a review of the Referee's decision, and the matter was reviewed by the Appeals Council and a decision rendered by said Appeals Council of the Social Security Administration under date of July 2, 1948, in which said Appeals Council held that plaintiff was not entitled to the benefits of the Social Security Act for the reason and upon the ground that the services rendered by plaintiff for the Albert Miller and Company at Burley, Idaho, was excepted employment as agricultural labor un-

der the provisions of Section 209 (1) (4) U. S. C. A. of the Social Security Act as amended, and that the Warehouse of the Albert Miller and Company in Burley, Idaho, where the plaintiff was employed did not constitute a "terminal market" within the meaning of that section of the Act, and that the operations performed by the Company in its Burley Warehouse were performed "as an incident to the preparation of potatoes for market."

VI.

That the Albert Miller and Company at Burley, Idaho, was engaged in the business of purchasing potatoes from farmers for the purpose of re-sale, either in interstate commerce or locally, from its warehouse at Burley, Idaho, and that after the purchase of said potatoes from the farmers said Albert Miller and Company transported said potatoes to its warehouse at Burley, Idaho, where said potatoes were sorted, washed and sacked according to grade, and thereafter resold by said Albert Miller and Company, either in interstate commerce or locally, and that at the time the plaintiff herein performed his services for and on behalf of said Albert Miller and Company, the farmers had parted title in said potatoes and had no further interest therein and that the warehouse operated by said Albert Miller and Company at Burley, Idaho, was both a "growers market" or "terminal market" within the provisions of Section 409 (1) (4), Title 42, U. S. C. A., in thats aid warehouse was a place where the farmers customarily parted with all their economic

interest in said potatoes, their future form or destiny, and that when said potatoes reached said warehouse said warehouse was then in the practical control of the Albert Miller and Company, a selling organization, and that the said Albert Miller and Company operated said warehouse at Burley, Idaho, as a purely commercial operation in the business of buying potatoes from farmers and thereafter selling said potatoes for its private profit after said Company had sorted, cleaned, bagged and otherwise processed said potatoes, and that the services performed by plaintiff during the period of time hereinabove alleged was not agricultural services within the meaning of Section 409 (1) (4) of the Social Security Act, United States Code Annotated.

VII.

That the decision of the Appeals Council of the Social Security Administration of the United States, rendered on the 2nd day of July, 1948, was contrary to law in refusing to compute the monthly benefits payable to plaintiff under the Act and to declare plaintiff to be eligible thereafter, and in eliminating as excepted employment under the Social Security Act the services performed by plaintiff for the Albert Miller and Company at its warehouse at Burley, Idaho.

Wherefore, Plaintiff prays that the decision of the Appeal Council of the Social Security Administration of the United States dated July 2, 1948, be reversed and this cause be remanded, with di-

rections to said Appeals Council to compute the benefits to which plaintiff is entitled under the Social Security Act, and in so doing to include the payments amounting to Nine Hundred Ninety-nine and 3/100 ($999.03) Dollars, made to plaintiff by Albert Miller and Company, in the following quarters:

December 31, 1941,
March 31, 1942,
June 30, 1942,
September 30, 1942,
December 31, 1942,

as part of his total wages in determining the amount of his primary insurance benefits as provided in Section 409 (e) (f) Title 42, United States Code Annotated, and that plaintiff be decreed to be entitled to the benefits of the Social Security Act from and after the 20th day of November, 1945; that plaintiff may have such other and further relief in the premises as equity and this court shall deem appropriate.

/s/ MARSHALL CHAPMAN,
Attorney for Plaintiff.

State of Idaho,
County of Twin Falls—ss.

Archie F. McLean, being first duly sworn, on oath, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint,

know the contents thereof, and that he believes the statements contained therein to be true.

/s/ ARCHIE F. McLEAN.

Subscribed and Sworn to before me this 24th day of August, A.D., 1948.

[Seal] /s/ MARSHALL CHAPMAN,
Notary Public for Idaho Residing at Twin Falls, Idaho.

[Endorsed]: Filed August 31, 1948.

[Title of District Court and Cause.]

MOTION

Comes now the United States Attorney for the District of Idaho and moves to dismiss the complaint heretofore filed by the plaintiff, on the following grounds:

I.

That said complaint fails to state a claim upon which relief can be granted.

II.

That Oscar Ewing is an improper party defendant; that the United States of America is the proper party defendant for the reason that it appears that the plaintiff is suing the Federal Security Administrator, an agency of the United States government.

III.

That the Court lacks jurisdiction over the person of Oscar Ewing.

/s/ JOHN A. CARVER,
United States Attorney for the District of Idaho.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for the District of Idaho.

[Endorsed]: Filed September 24, 1948.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes Now, the Plaintiff above-named and complains of the defendant above-named, and for cause of action alleges:

I.

That the plaintiff, Archie F. McLean, is a resident of the State of Idaho, and resides in the District of Idaho, Southern Division, District Court of the United States, hereinabove set forth.

II.

That the defendant, Oscar Eking, is the duly appointed qualifiied and acting Federal Security Administrator charged with the duty of administering what is commonly known as the Social Security Act.

III.

That the plaintiff, Archie F. McLean, earned during the calendar quarter ending December 31,

1941, the sum of One Hundred Ten and 25/100 ($110.25) Dollars; during the calendar quarter ending March 31, 1942, the sum of Two Hundred Fifty-seven and 33/100 ($257.33) Dollars; during the calendar quarter ending June 30, 1942, the sum of One Hundred Forty-one and 35/100 ($141.35) Dollars; during the calendar quarter ending September 30, 1942, the sum of One Hundred Thirty-three and 12/100 ($133.12) Dollars, and during the calendar quarter ending December 31, 1942, the sum of Three Hundred Fifty-six and 98/100 ($356.98), and during which time said plaintiff was employed by Albert Miller and Company at Burley, Idaho, and that the services rendered by plaintiff to said Albert Miller and Company during the periods aforesaid, were as follows:

(a) Feeding potatoes into sorter and washer;

(b) Working on sorting table;

(c) Removing bags from sorting machine, and

(d) Assisting in loading railroad freight cars and assisting in loading trucks and other vehicles from warehouse.

IV.

That plaintiff performed four full quarters of work for and on behalf of the Albert Miller and Company at its Burley warehouse, and in addition to the services rendered by plaintiff to said Albert Miller and Company, said plaintiff performed serv-

ices for other employers, which employment was covered by the Social Security Act, constituting thirteen (13) quarters on the 20th day of November, 1945, at which time plaintiff ceased to be employed, and that upon said date plaintiff was eligible to the benefits of the Social Security Act.

V.

That plaintiff thereafter made application to the Social Security Administration for the benefits accruing to plaintiff under the provisions of the Social Security Act by reason of the employment of plaintiff for a period of seventeen (17) quarters prior to ceasing his employment and after having reached the age of sixty-five (65) years; that thereafter a hearing was had upon plaintiff's application for benefits under the Social Security Act, before Martin Tieburg, Referee, on the 8th day of July, 1946, and that said Referee held that plaintiff was not entitled to receive the benefits of the Social Security Act for the reason and upon the ground that the services performed by Plaintiff for the Albert Miller and Company was excepted from the Social Security Act under the provisions of Section 209 (1) (4); that thereafter, plaintiff requested for a review of the Referee's decision, and the matter was reviewed by the Appeals Council and a decision rendered by said Appeals Council of the Social Security Administration under date of July 2, 1948, in which said Appeals Council held that plaintiff was not entitled to the benefits of the Social Security Act for the reason and upon the

ground that the services rendered by plaintiff for the Albert Miller and Company at Burley, Idaho, was excepted employment as agricultural labor under the provisions of Section 209 (1) (4) U. S. C. A. of the Social Security Act as amended, and that the Warehouse of the Albert Miller and Company in Burley, Idaho, where the plaintiff was employed did not constitute a "terminal market" within the meaning of that section of the Act, and that the operations performed by the Company in its Burley Warehouse were performed "as an incident to the preparation of potatoes for market."

VI.

That the Albert Miller and Company at Burley, Idaho, was engaged in the business of purchasing potatoes from farmers for the purpose of resale, either in interstate commerce or locally, from its warehouse at Burley, Idaho, and that after the purchase of said potatoes from the farmers said Albert Miller and Company transported said potatoes to its warehouse at Burley, Idaho, where said potatoes were sorted, washed and sacked according to grade, and thereafter resold by said Albert Miller and Company, either in interstate commerce or locally, and that at the time the plaintiff herein performed his services for and on behalf of said Albert Miller and Company, the farmers had parted title in said potatoes and had no further interest therein and that the warehouse operated by said Albert Miller and Company at Burley, Idaho, was

both a "growers market" or "terminal market" within the provisions of Section 409 (1) (4), Title 42, U. S. C. A., in that said warehouse was a place where the farmers customarily parted with all their economic interest in said potatoes, their future form or destiny, and that when said potatoes reached said warehouse said warehouse was then in the practical control of the Albert Miller and Company, a selling organization, and that the said Albert Miller and Company operated said warehouse at Burley, Idaho, as a purely commercial operation in the business of buying potatoes from farmers and thereafter selling said potatoes for its private profit after said Company had sorted, cleaned, bagged and otherwise processed said potatoes, and that the services performed by plaintiff during the period of time hereinabove alleged was not agricultural services within the meaning of Section 409 (1) (4) of the Social Security Act, United States Code Annotated.

VII.

That the decision of the Appeals Council of the Social Security Administration of the United States, rendered on the 2nd day of July, 1948, was contrary to law in refusing to compute the monthly benefits payable to plaintiff under the Act and to declare plaintiff to be eligible thereafter, and in eliminating as excepted employment under the Social Security Act the services performed by plaintiff for the Albert Miller and Company at its warehouse at Burley, Idaho.

Wherefore, Plaintiff prays that the decision of the Appeal Council of the Social Security Administration of the United States dated July 2, 1948, be reversed and this cause be remanded, with directions to said Appeals Council to compute the benefits to which plaintiff is entitled under the Social Security Act, and in so doing to include the payments amounting to Nine Hundred Ninety-nine and 03/100 ($999.03) Dollars, made to plaintiff by Albert Miller and Company, in the following Quarters:

December 31, 1941,
March 31, 1942,
June 30, 1942,
September 30, 1942,
December 31, 1942,

as part of his total wages in determining the amount of his primary insurance benefits as provided in Section 409 (e) (f) Title 42, United States Code Annotated, and that plaintiff be decreed to be entitled to the benefits of the Social Security Act from and after the 20th day of November, 1945; that plaintiff may have such other and further relief in the premises as equity and this court shall deem appropriate.

/s/ MARSHALL CHAPMAN,
Attorney for Plaintiff.

State of Idaho,
County of Twin Falls—ss.

Marshall Chapman, Being first duly sworn, on oath, deposes and says:

That he is the attorney for the within named plaintiff, Archie F. McLean, and makes this verification for and on behalf of said plaintiff for the reason that he is not a resident of and within the County of Twin Falls wherein this affiant resides; that he has read the within and foregoing Amended Complaint, knows the contents thereof, and that he believes the statements therein contained to be true.

/s/ MARSHALL CHAPMAN.

Subscribed and Sworn to before me this 29 day of October, A.D., 1948.

[Seal] /s/ EARL R. STANSELL,
Notary Public for Idaho, Residing at Twin Falls, Idaho.

[Endorsed]: Filed October 30, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now, the defendant, Oscar Ewing, Federal Security Administrator, by his attorneys of record, John A. Carver, United States Attorney in and for the District of Idaho, and Paul S. Boyd, Assistant United States Attorney, and for his answer to the complaint filed herein says:

First Defense

1. The plaintiff has no claim upon which relief

can be granted, as shown by the provisions of the Social Security Act, as amended, by the regulations of the Social Security Administration promulgated thereunder, by the transcript of the record upon which the decision complained of was made, and by the findings and conclusions of the Social Security Administration based thereon.

Second Defense

2. The facts as found by the Referee of the Social Security Administration and by the Appeals Council of that Administration show that plaintiff's services rendered Albert Miller and Company in 1941 and 1942 were excepted from employment as "agricultural labor" under the provisions of Section 209(1)(4) of the Social Security Act, as amended. Under the applicable regulations and practices, the decision of the Appeals Council became the final decision of the Federal Security Administrator. The findings are supported by substantial evidence and are conclusive. The defendant, therefore, properly decided that plaintiff was not entitled to wage credits for his earnings for said services.

Third Defense

3. Defendant admits the allegations contained in paragraph I, and II, of the complaint.

4. Answering paragraphs III, IV, V, and VI, of the complaint, defendants refers to the findings of fact of the Social Security Administration con-

tained in the transcript of the record, filed herewith as part of this answer, as establishing the facts on which this action to review is based, and except as herein admitted denies each and every allegation in said paragraphs.

5. Further answering paragraph III, of the complaint, defendant admits the allegations contained therein but alleges that the aforesaid services of the plaintiff was performed as an incident to the preparation of the potatoes for market and were not performed in connection with commercial canning or commercial freezing nor after delivery of the potatoes to a terminal market for distribution for consumption.

6. Further answering paragraph IV, of the complaint defendant admits that plaintiff performed four full quarters of work for Albert Miller and Company, and that he also performed services for other employers, but denies that such other employment constituted 13 quarters on the 20th day of November, 1945. Defendant further denies that on said date plaintiff was eligible to the benefits of the Social Security Act.

7. Further answering paragraph V, of the complaint, defendant admits that plaintiff filed an application for benefits under the Social Security Act, but denies that plaintiff was employed as claimed for a period of 17 quarters prior to ceasing his employment and after having reached the age of 65 years. Defendant admits that a hearing was had be-

fore Martin Tieburg, Referee, on July 8, 1946, but denies that the hearing was "pon plaintiff's application for benefits." Defendant alleges that the hearing was a wage-record revision proceeding (Section 205(c)(3) of the Social Security Act, as amended, 42 U.S.C.A. 405(c)(3)), to determine whether the wage record kept by the Social Security Administration should be revised so as to include therein salary received by plaintiff for services rendered for Albert Miller and Company in 1941 and 1942. Defendant denies that the Referee held that the plaintiff was not entitled to receive the benefits of the Social Security Act but admits that the Referee held that the services performed by plaintiff for Albert Miller and Company were excepted from the Social Security Act under the provisions of Section 209(1)(4). Defendant further admits that at the request of plaintiff the Appeals Council of the Social Security Administration reviewed the Referee's decision and held that plaintiff's services rendered Albert Miller and Company in 1941 and 1942 were excepted from employment as "agricultural labor" under the provisions of Section 209(1)(4) of the Social Security Act, as amended, but denies that the Appeals Council held that the plaintiff was not entitled to the benefits of the Social Security Act.

8. Further answering paragraph VI of the complaint, defendant denies that Albert Miller and Company was a "growers' market" or "terminal Market" within the provisions of Section 409(1)(4) Title 42 U.S.C.A. Defendant denies that the serv-

ices performed by plaintiff for Albert Miller and Company were not "agricultural labor" within the meaning of said Section. Defendant denies that any more than approximately one-half of the potatoes were sorted, washed, and packed after their purchase from the farmers by Albert Miller and Company. Defendant denies that at the time the plaintiff performed his services for Albert Miller and Company that the farmers had no further interest in the potatoes; and in this connection, defendant alleges that plaintiff's services were chiefly with respect to the potatoes which were purchased and paid for on the basis of sorting and grading in the company's warehouse. Defendant further alleges that approximately 60 per cent of the potatoes handled by Albert Miller and Company at Burley, Idaho, were not re-sold locally but rather were sold in interstate commerce in carload lots to wholesalers and dealers in various points in the United States, and that all the plaintiff's services for Albert Miller and Company were in connection with the potatoes so shipped in interstate commerce to wholesalers and dealers and not to retailers or consumers.

9. Defendant denies the allegations contained in paragraph VII of the complaint.

10. Further answering the allegations of the complaint, the defendant states that the proceedings before the Referee and the Appeals Council were under Section 205(c)(3) of the Social Security Act, as amended, 42 U.S.C.A. 405(c)(3), to determine

whether the wage records kept by the Social Security Administration should be revised so as to include therein salary received by plaintiff for his services for Albert Miller and Company in 1941 and 1942; that the plaintiff's application for benefits is not in the required condition to be acted upon and has never been allowed or disallowed by the Bureau of Old-Age and Survivors Insurance and that the question of plaintiff's entitlement to benefits was not determined by the Referee or by the Appeals Council, the sole subject matter of the proceedings before the Referee and the Appeals Council being the question as to whether plaintiff's services for Albert Miller and Company were excepted from coverage under the Social Security Act, as "agricultural labor" under the provisions of Section 209(1)(4) of the Act; that if the Court were to hold that such services were in covered employment and not excepted as "agricultural labor," it is possible that the plaintiff would be able to qualify for benefits, but that it would first require further proceedings by the Bureau of Old-Age and Survivors Insurance to make its determination as to how many quarters of coverage the plaintiff has in other covered employment and the total amount of his wage credits, and as to whether the plaintiff is of the requisite age has met the other statutory conditions for entitlement to benefits; that there has been no administrative determination as to these other statutory conditions for establishing entitlement to benefits and that the plaintiff has not exhausted his admin-

istrative remedies with respect thereto. Therefore, the only jurisdiction of the Court in this case (if otherwise properly brought) is to review the decision of the Appeals Council of the Social Security Administration, holding that the services rendered by plaintiff for Albert Miller and Company were excepted from employment as "agricultural labor."

11. Defendant denies each and every allegation in the complaint, not herein admitted, controverted or specifically denied.

12. In accordance with the provisions of Title II, Sec. 205(g) of the Social Security Act, as amended, 42 U.S.C.A. Sec. 405(g), defendant files herewith as part of his answer a certified copy of the transcript of the record, including the evidence upon which the findings and decision complained of are based.

Wherefore, defendant prays for a judgment dismissing the complaint with costs and disbursements and for judgment in accordance with Section 205(g) of the Social Security Act, as amended, affirming the decision of the Social Security Administration herein complained of; and for such other relief as may be appropriate.

/s/ JOHN A. CARVER,
United States Attorney.

/s/ PAUL S. BOYD,
Assistant United States Attorney, Attorneys for Defendant.

I hereby certify that I have served a copy of the foregoing answer upon Marshall Chapman, Esquire, Attorney for the plaintiff, by mailing a copy of the same to him, at 248 Third Avenue East, Twin Falls, Idaho, this 3d day of December, A.D. 1948.

/s/ PAUL S. BOYD,
Assistant United States
Attorney.

[Endorsed]: Filed December 3, 1948.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Now comes the defendant, Oscar Ewing, the Federal Security Administrator, by his attorneys of record, John A. Carver, United States Attorney in and for the District of Idaho, and Paul S. Boyd, Assistant United States Attorney, and respectfully moves this Court for summary judgment in the above-entitled action pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law, and for judgment in accordance with Section 205(g) of Title II of the Social Security Act, as amended, affirming the decision of the Social Security Administration herein complained of.

/s/ JOHN A. CARVER,
United States Attorney.

/s/ PAUL S. BOYD,
Assistant United States Attorney, Attorneys for Defendant.

NOTICE OF MOTION

To: Marshall Chapman, Esquire
248 Third Avenue East,
Twin Falls, Idaho.

Please take notice that the undersigned will bring the foregoing motion for summary judgment on for hearing before this Court in Room ...., United States Courthouse, City of Boise, Idaho, on the 20th day of December, 1948, at 11:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ JOHN A. CARVER,
United States Attorney.

/s/ PAUL S. BOYD,
Assistant United States Attorney, Attorneys for Defendant.

I hereby certify that I have sent a true copy of the foregoing motion and notice and of the memorandum brief in support of defendant's motion to Marshall Chapman, Esquire, Attorney for plaintiff, by mailing a copy thereof in an envelope bearing Government frank and addressed to him at 248 Third Avenue East, Twin Falls, Idaho, this 3rd day of December, A.W. 1948.

/s/ PAUL S. BOYD,
Assistant United States Attorney.

[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND FOR JUDGMENT AFFIRMING THE DECISION OF THE SOCIAL SECURITY ADMINISTRATION UNDER REVIEW

The defendant has moved for summary judgment on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law (Rule 56(b) Federal Rules of Civil Procedure), and for judgment in accordance with Section 205(g) of the Social Security Act, as amended, (Title 42, U.S.C., Section 405 (g)), affirming the decision of the Social Security Administration herein complained of.

The complaint does not refer to any specific section of the Social Security Act as sustaining the Court's jurisdiction (See Rule 8(a) Federal Rules of Civil Procedure). However, the action was presumably filed pursuant to Section 205(g) of the Act to review a determination of the Appeals Council of the Social Security Administration rendered on July 2, 1948, which decided that plaintiff's services rendered Albert Miller and Company in 1941 and 1942 were excepted from employment as "agricultural labor" under the provisions of Section 209(1)(4) of the Social Security Act, as amended, and hence that no part of his alleged earnings of $999.03 for such services should be included in com-

puting any primary insurance benefit to which he might be entitled. The primary insurance benefit is calculated from the "average monthly wage" (Section 209(e) of the Act, as amended, 42 U.S.C. 409(e)) which, in turn is computed on the basis of the statutory "wages" (Section 209(f) of the Act, as amended, 42 U.S.C. 409).

In this action plaintiff seeks (1) the reversal of the decision of the Appeals Council which held that his services for Albert Miller and Company in 1941 and 1942 were excepted from operation of the Act, as amended; (2) that the Social Security Administration be compelled to include payments for such services allegedly amounting to $999.03 as a part of his total wages in determining the amount of his primary insurance benefit; and (3) that he be decreed to be entitled to the benefits of the Social Security Act from and after November 20, 1945.

The proceedings before the Referee and the Appeals Council were under Section 205(c)(3) of the Social Security Act, as amended, 42 U.S.C.A. 405 (c)(3), to determine whether the wage records kept by the Social Security Administration should be revised so as to include therein salary received by plaintiff for his services for Albert Miller and Company in 1941 and 1942. The plaintiff's application for benefits is not in the required condition to be acted upon and has never been allowed or disallowed by the Bureau of Old-Age and Survivors Insurance. The question of plaintiff5s eligibility for benefits was not determined by the Referee or by

the Appeals Council. The sole subject matter of the proceedings before the Referee and the Appeals Council was the question of whether plaintiff's services for Albert Miller and Company were excepted from coverage under the Social Security Act, as "agricultural labor" under the provisions of Section 209(1)(4) of the Act. If this Court should hold that such services were in covered employment and not excepted as "agricultural labor," it is possible that the plaintiff would be able to qualify for benefits, but it would first require further proceedings by the Bureau of Old-Age and Survivors Insurance to make its determination as to how many quarters of coverage the plaintiff has in other covered employment and the total amount of his wage credits, and also whether the plaintiff is of the requisite age and has met the other statutory conditions to entitle him to benefits. There has been no administrative determination as to these other statutory conditions for establishing eligibility to benefits, and accordingly the plaintiff has not exhausted his administrative remedies with respect thereto. Therefore, the only jurisdiction of the Court in this case (if otherwise properly brought) is to review the decision of the Appeals Council of the Social Security Administration, holding that the services rendered by plaintiff for Albert Miller and Company were excepted from employment as "agricultural labor." If the Court should decide the issue here in favor of the plaintiff it could not order benefits paid to plaintiff but could only refer the

matter back to the Social Security Administration for further proceedings.

The Issue

The only issue in this case is whether as a matter of law, the Social Security Administration erred in deciding that plaintiff's services rendered Albert Miller and Company in the handling of potatoes at its warehouse in Burley, Idaho, in 1941 and 1942 were excepted from employment as "agricultural labor" under the provisions of Section 209(1)(4) of the Social Security Act, as amended, and that thus plaintiff was not entitled to wage credits for his earnings for such services.

The Facts

The plaintiff in the month of November, 1941, commenced rendering services for Albert Miller and Company in its Burley, Idaho, warehouse or packing shed, and was employed and paid salary in the months of November, 1941, through November, 1942, except in the months of June, July and August, 1942.[1] The Albert Miller and Company, a corporation, had its principal office in Chicago, Illinois, and is designated as a "carlot potato distributor."

It is customary in the production of potatoes in the district in which the company's Burley, Idaho, warehouse is situated, for the farmers to har-

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[1]Apparently the company discontinued its Burley warehouse in 1944 (Tr. 59).

vest their potatoes and place them in storage cellars in bulk without sorting or grading them. At that point they are not as yet ready for distribution to the consuming public, as potatoes there raised are sold in two grades, to wit: U. S. No. 1's and U. S. No. 2's. With respect to the potatoes handled by the company in Burley, usually they were purchased from the farmers after they had been placed in the farmer's cellar, and were either purchased and paid for as a lot as they stood in the cellar or after grading into U. S. No. 1's and U. S. No. 2's, either in the farmer's cellar or in the company's warehouse, the sorting and grading being done by the company whether in the farmer's cellar or in its own warehouse after trucking the potatoes to the warehouse at its own expense. Approximately one-house. Regardless of how they were purchased and paid for on the basis of measurement or sorting and grading in the farmer's cellar, and the other half on the basis of sorting and grading in the warehouse. Regardless of how they were purchaed and paid for, most of the potatoes were brought into the warehouse either in bulk or in sacks, for the purpose of further washing, sorting and grading. The first function of the warehouse operation was to feed all of the potatoes through the washer, then to sort them into two grades above noted. All of the U. S. No. 1's were then packed in 100-pound sacks with the exception of the choice and largest potatoes which were packed in 10-pound and 25-pound sacks, and some of the No. 2's were packaged

in 100-pound sacks and others of the No. 2's were placed in bins in bulk awaiting shipment. Immediately after such packing in sacks, they were either shipped in carload lots to various United States markets as directed by the home office, or were stored in the basement of the company's warehouse awaiting developments in the potato markets.

Approximately sixty per cent of the potatoes were shipped in carload lots to wholesalers and dealers in various cities in the United States upon directions received from the company's Chicago office, and the wholesalers and dealers then distributed them to various retailers and dealers, who in turn distributed them to the consuming public. The other approximately forty per cent of such potatoes were sold by the manager of the Burley warehouse, under general authority given by the company, to local produce companies, local, intrastate, and interstate transportation companies, restaurants, stores, and private individuals. Most of the potatoes which were sold locally from the warehouse had been purchased directly from the growers, having been sorted and graded in the growers' cellars and were not washed or sorted in the warehouse.

The principal activity which the plaintiff engaged in while employed by the company, consisted of approximately 45 per cent in washing operations and 55 per cent in grading operations at the Burley warehouse, neither of which operations was performed in the warehouse respecting potatoes sold

locally. His services related solely to the potatoes (sixty per cent of the total handled) which were shipped interstate in carload lots to wholesalers and dealers located at distant points from Burley, Idaho.

The referee's decision also contains the finding, "Upon taking the potatoes from the farmer, and in some cases previous to the actual taking of said potatoes from the farm to the warehouse, the title to the potatoes passed to the company, and through all stages of the company's operations the potatoes handled were the property of the company." This finding might appear inconsistent with the finding, as to a large part of the potatoes handled, that such potatoes were purchased and paid for on the basis of sorting and grading into U. S. No. 1's and U. S. No. 2's, by the company. This was the case as to the approximately one-half of all the potatoes handled, which the referee found were purchased and paid for on the basis of sorting and grading in the company's warehouse, and also as to such of the potatoes as were purchased and paid for on the basis of sorting and grading by the company in the farmer's cellar. Perhaps the apparent inconsistency can be explained by the fact that where, although the potatoes were in bulk, they were purchased by the company, not in bulk, but rather as U. S. No. 1's and U. S. No. 2's, in accordance with the results of sorting and grading to be done by the company, it is very difficult to determine whether title passes before, or after, the potatoes

have been sorted and graded into U. S. No. 1's and U. S. No. 2's, and because, even though title passed to the company before the sorting and grading, the farmer retained an economic interest in the potatoes, since his return could not be measured until after the sorting and grading.

The Administrative Proceedings

The plaintiff disagreed with a determination of the Bureau of Old-Age and Survivors Insurance of the Social Security Administration, whereby he was disallowde wage credits for his earnings for services which he had rendered for Albert Miller and Company, in the handling of potatoes at its warehouse in Burley, Idaho, in 1941 and 1942. He filed a requests for a hearing before a Referee of the Social Security Administration. (The right of an individual to a hearing with respect to any "alleged omission of wages of such individual" in the wage records maintained by the Administrator, is provided for by Section 205(c)(3) of the Social Security Act, as amended, and Section 403.703 of Social Security Administration Regulations No. 3.) Such a hearing was held on March 26, 1946, and resulted in a decision (Tr. 16-19) by the Referee, dated July 8, 1946, that the services performed by the plaintiff for Albert Miller and Company, were excepted from employment as "agricultural labor" under the provisions of Section 209(1)(4) of the Social Security Act, as amended, and that hence "the wage records kept

by the Board should not be revised to include therein salary received by claimant for services rendered for Albert Miller and Company." In reaching this decision, the Referee found, inter alia, that the Burley warehouse of the company was not a "terminal market," and that the company's operations in its Burley warehouse were "an incident to the preparation of" the potatoes for market. Plaintiff requested and obtained from the Appeals Council, a review of the Referee's decision. The Appeals Council, at plaintiff's request, received evidence in addition to that which was before the Referee, and on July 2, 1948, issued its decision (Tr. 2-4) affirming the decision of the Referee. In reaching its decision the Appeals Council found, inter alia, that plaintiff's services "were performed prior to the delivery of the potatoes to a terminal market," and "as an incident to the preparation of such * * * vegetables for market." Under the applicable regulations and practices, the decision of the Appeals Council became the final decision of the Federal Security Administrator.

Statute Involved

Section 209(a) of the Social Security Act, as amended, defines "wages" as "* * * remuneration for employment * * *"

Section 209(b) defines the term "employment" as "* * * service performed * * * by an employee for the person employing him * * * except (1)

Agricultural labor (as defined in subsection (1) of this section)."

Section 309(1) reads in patr as follows:

> "The term 'agricultural labor' includes all service performed——
>
> * * *
>
> "(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption."

Argument

Point I

The Social Security Administration correctly found that plaintiff's services rendered Albert Miller and Company in the handling of potatoes at its warehouse in Burley, Idaho, in 1941 and 1942 were excepted from employment as "agricul-

> tural labor" under the Social Security Act, as amended, and that thus plaintiff was not entitled to wage credits for his earnings for such services.

Under the provisions of Section 209(1)(4) of the Social Security Act, as amended, previously quoted, the services rendered by the plaintiff constituted "agricultural labor," if such services were performed "as an incident to the preparation of such" potatoes for market, and not after the delivery of potatoes "to a terminal market for distribution for consumption."

On the question as to whether plaintiff's services in the Burley warehouse were performed as an incident to the preparation of the potatoes for market, the Referee stated his conclusion as follows:

> "It is evident from the facts in this case, and the Referee finds, that potatoes handled by the company in its Burley warehouse were not fully prepared for market until they were washed and finally sorted and graded, and it is therefore the finding of this Referee that the operations of this company in its Burley warehouse were incident to the preparation of potatoes for market."

As to approximately one-half of the potatoes handled, the company purchased and paid for them on the basis of sorting and grading into U. S. No. 1's and U. S. No. 2's in the company's warehouse. As for the remaining approximately one-half of the potatoes handled, some were purchased and paid for

as a lot as they stood in the farmer's cellar, and some were purchased and paid for after sorting and grading, by the company, into U. S. No. 1's and U. S. No. 2's in the farmer's cellar. Thus most of the potatoes handled by the company at Burley, were purchased and paid for on the basis of sorting and grading into U. S. No. 1's and U. S. No. 2's. Moreover, all of the potatoes, including those which the company purchased and paid for as a lot as they stood in the farmer's cellar, had to be sorted and graded into U. S. No. 1's and U. S. No. 2's before they were ready for distribution for consumption and before they were even ready for the wholesale market. According to the additional evidence supplied by plaintiff to the Appeals Council, approximately sixty per cent of the potatoes were shipped by the company to various points in the United States upon directions emanating from the company's Chicago office, and approximately forty per cent of the potatoes were sold locally, most of the local sales being of potatoes which had been sorted and graded by the company in the farmer's cellars and not in the company's warehouse. Although legal title to the potatoes may have passed to the company before the warehouse operations started, the purchase by the company was (as to most of the potatoes handled) of U. S. No. 1 and U. S. No. 2 potatoes, in the same sense that in Michigan Unemployment Comp. Comm. v. Unionville Milling Co., 313 Mich. 292, 21 N. W. 2d 135, and in In re Lazarus, 294, N. Y. 613 N. W. 2d 169,

the purchase of beans by elevator operators from the growers who were paid on the basis of "choice hand-picked beans," was construed to constitute the purchase of "picked" (sorted and graded) beans, the sorting and grading to be done in the elevator by employees of the elevator operator and held to constitute "agricultural labor" within the meaning of an "agricultural labor" definition which is the same as the Federal definition involved in the instant case.

That the Burley warehouse of the company was not "a terminal market for distribution for consumption" of the potatoes, would seem clear from the fact that apparently sixty per cent of the potatoes handled were shipped by the company interstate, in carload lots, to wholesalers and dealers at various points in the United States and not to retailers or consumers. At least with respect to the sixty per cent of the potatoes so handled, they had not reached their "terminal market" until they came into the hands of the wholesalers and dealers to whom the company shipped the potatoes in carload lots. And, as stated by the Appeals Council, "the operations of the Burley warehouse must be considered as a whole and the fact that sixty per cent of the potatoes bought through that warehouse were sold to wholesalers and dealers located at points far distant supports the conclusion that such points, rather than the Burley warehouse, constituted the 'terminal market' for its output, within the meaning of the Act." The facts in this case also show that the plaintiff's services were per-

formed wholly with respect to the potatoes (approximately 60% of the total handled), which were shipped in carload lots to wholesalers and dealers rather than to retailers or consumers. Hence, the evidence supports the conclusion that the plaintiff's services were performed as "an incident to the preparation of * * * such vegetables [potatoes] for market," and not "after delivery to a terminal market for distribution for consumption," within the meaning of Section 209(1)(4).

A recently decided case involved the "agricultural labor" question as to services performed with respect to potatoes handled under facts quite similar to those in the instant case. We refer to Janssen v. Employment Security Commission, Wyo., 192 P. 2d 606, in which it was held, inter alia, that services performed in processing, packing, and marketing potatoes grown by others and purchased by the processor, were not exempt as "agricultural labor" under the Wyoming Employment Security Law. That case was decided under a different and narrower definition of "agricultural labor" than the definition which is involved in the instant case. Significantly, however, the court clearly indicated that a contrary conclusion would have been reached if that case had involved the definition which governs the instant case. The court said (pp. 609-610):

> "In 1939 Congress believed that the exemptions under the then existing law, and the regulation pursuant thereto in connection with agri-

cultural labor should be broadened because 'in the case of many of such services, it has been found that the incidence of the taxes falls exclusively upon the farmer, a factor which, in numerous instances, has resulted in the establishment of competitive advantages on the part of large farm operators to the detriment of the smaller ones.' See Report 728 of the House Ways and Means Committee 76 Congress 1st Session. So Congress passed an Act on August 10, 1939, effective January 1, 1940, exempting agricultural labor from the term employment by defining the term agricultural labor to include, among others, services:

"'(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.' 26 U. S. C. A. Int. Rev. Code, sec. 1426.

"Most of the states thereafter modified their Social Security Act in conformity with the provisions of the federal act. It has been held that under the amended act no tax is due from employers under facts similar to those in the case at bar. Cache Valley Turkey Growers Ass'n v. Industrial Commission, 106 Utah 1, 144 P. 2d 537; Claim of Lazarus, 268 App. Div. 547, 52 N.Y.S. 2d 682; affirmed by an opinion in 292 N.Y. 613, 64 N.E. 2d 169; Unemployment Compensation Commission v. Unionville Milling Co., 313 Mich. 292, 21 N.W. 2d 135. The legislature of Wyoming, however, refused or neglected, as noticed above, to follow the foregoing trend in legislation, and instead of enlarging exemptions from taxation in connection with agriculture took the opposite course and distinctly narrowed and limited them."

It is apparent that the plaintiff in this case seeks to bring his services within the holding in Miller v. Burger, 161 F. 2d (C.C.A. 9). We believe, however, that the Burger case is clearly distinguishable from the present case. In the first place, the services that were involved in the Burger case were with respect to dried fruits, whereas the instant case involves fresh vegetables. Both the Bureau of Internal Revenue (Em T-Coll. Mim. 6219, Dec. 31, 1947, as modified by Coll. Mim. 6239, March 1, 1948), and the Social Security Administration have drawn a distinction between the handling, grading, and preparation of fresh fruits and vegeatbles, as compared

with the operations in processing dried fruits. The position has been taken by both agencies, that services performed in the employ of a commercial handler of fresh fruits and vegetables purchased by the handler from the farmer producer, in the handling, packing, packaging, grading, and preparation of such fresh fruits and vegetables in their raw or natural state prior to the sale thereof, or delivery thereof for shipment or sale, to a wholesaler or dealer, are excepted services under Section 209(1)(4). It may well be argued that services after the slicing, pitting, and drying of fruits in the Burger case were not incidental to the preparation of such fruits for market; whereas, the washing, sorting, and grading of potatoes, were incidental to the preparation of the potatoes for market. As pointed out by the Referee the potatoes were not ready for distribution to the consuming public prior to their washing, sorting, and grading. Indeed, the facts show that until the potatoes had been sorted and graded into U. S. No. 1's and U. S. No. 2's, they were not even ready for the wholesale market, since all of the potatoes handled by the company at its Burley warehouse were marketed by it only after sorting and grading into U. S. No. 1's and U. S. No. 2's.

Moreover, whereas in the Burger case the services were performed with respect to dried fruit which the packer had purchased outright on the basis of the condition such fruit was in at the time of such purchase, here the plaintiff's services were performed with respect to raw potatoes which Albert

Miller and Company purchased, for the most part, on the basis that it would sort and grade them into U. S. No. 1's and U. S. No. 2's and would pay the farmer on that basis; in other words, unlike in the Burger case, here the nature of the transaction was such as to show that the parties contemplated, and that the transaction required, the performance of services such as those which were performed by the plaintiff. The farmer in effect sold the potatoes to the company, not in the condition they were in at the time the company took or had the right to possession, but rather in the contemplated condition after the sorting and grading into U. S. No. 1's and U. S. No. 2's (Tr. 67, 73). The "growers' market" concept of the Burger case was predicated upon the fact that at the time of sale by the farmer producer to the commercial handler, "the farmer producer * * * parted with all of his economic interest in the fruit, its future form or destiny." In the instant case, however, there was a continuing economic interest in the potatoes by the farmer, because his return could not be measured until after the performance of the sorting and grading operations.

Point II.

Findings of the Federal Security Administrator supported by substantial evidence are conclusive.

Congress has committed the determination of rights to Title II benefits to the Federal Security Administrator. Section 205(g) of the Social Se-

cuity Act, as amended, contains the conventional limitations on judicial review of administrative decisions. It provides that the "findings of the Administrator as to any fact, if supported by substantial evidence, shall be conclusive." Walker v. Altmeyer, 137 F. (2) 531 (C.C.A. 2); Social Security Board v. Warren 142 F. (2) 974 (C.C.A. 8); Holland v. Altmeyer, 60 F. Supp. 954 (D. Minn.); Thompson v. Social Security Board, 154 F. 2d 204 (App. D.C.). The finality accorded to the Administrator's findings (i.e., the findings of the Appeals Council of the Social Security Administration) by the Act extends to his inferences or conclusions so long as they are reasonably reached upon due consideration and after a hearing. The Administrator's findings are sound and unquestionably supported by substantial evidence. They are therefore binding on this Court.

In N.L.R.B. v. Hearst Publications, 322 U. S. 111, 130-131, the Court said:

> "In making that body's determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. Labor Board v. Nevada Copper Corp., 316 U. S. 105; cf. Walker v. Altmeyer, 137 P. 2d 531 (C.C.A.). Undoubtedly questions of statutory interpretation,

> especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294; United States v. American Trucking Assns., 310 U. S. 534. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a 'member of a crew' (South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251) or that he was injured 'in the course of employment' (Parker v. Motor Boat Sales, 314 U. S. 244) and the Federal Communications Commission's determination that one company is under the 'control' of another (Rochester Telephone Corp. v. United States, 307 U. S. 125), the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."

As stated by the court in United States and Social Security Board v. LaLone, 152 F. (2) 43 (C.C.A. 9),

> //Under this section of the Social Security Act providing for appeals from an administrative board, as under other similar acts, the board's

findings of fact must be sustained if the court finds they are supported by substantial evidence. This same finality extends to the board's inferences and conclusions from the evidence if a substantial basis is found for them. Gray v. Powell, 314 U. S. 402, Dobson v. Comm'r. 320 U. S. 489, 501-3; Comm'r. v. Scottish American Investment Co., Inc., 323 U. S. 119; N.L. R.B. v. Hearst Publications, 322 U. S. 111; Walker v. Altmeyer, 2 Cir., 137 F. (2) 531; Social Security Board v. Warren 8 Cir., 142 F. (2) 974."

The same principle was applied with respect to a finding by the Social Security Board (now Social Security Administration) that a wage earner's widow was not "living with" him at the time of his death. In Thompson v. Social Security Board, 154 F. (2d) 204, (App. D. C.), the court, in a per curiam decision, said:

"Appellant sued in the District Court to review a decision of the Social Security Board. This appeal is from a summary judgment for the Board.

"Appellant had filed with the Board a claim to insurance benefits as the widow of a wage-earner. The Board had found, on conflicting evidence, that appellant was not 'living with' the wage-earner at the time of his death and therefore was not entitled to benefits. 53 Stat. 1365,§ 202 (e)(1), 42 U.S.C.A. § 402 (e)(1),

53 Stat. 1378 § 209(n), 42 U.S.C.A. § 409(n). The Board filed in the District Court a certified copy of the record, including the evidence on which the Board's findings and judgment were based. The proceedings before the court were a review of that record, not a trial de novo. Since the evidence in support of the Board's findings of fact was substantial, those findings were conclusive. 53 Stat. 1370, § 205(g), 42 U.S.C.A. § 405(g). The District Court was therefore right in entering summary judgment."

And in Albert J. and Isabella C. Connelly v. Social Security Board, et al., (October 21, 1946, not reported), the District Court for the Eastern District of Kentucky, affirming the decision of the Board, said:

"The court must conclude from the record that the facts as found by the referee and approved by the Social Security Board are supported by substantial evidence and they are accordingly approved and adopted. Section 205(g) of the Act provides that upon review by the Court, 'The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive.'

"By this specific language the Congress vested the Administrative body with the responsibility of determining from the evidence the facts of this case. By that determination this Court is bound." (Citing Gray v. Powell, supra, and Walker v. Altmeyer, supra.)

In the present case the Administrator's inferences were not merely permissible from the evidence; they were compelled. See Gardner v. R.R.B., 148 F. (2) 935 (C.C.A. 5), cert. den. 66 S. Ct. 331. There is no latitude for judicial reexamination of these inferences and implications by what amounts to a judicial trial de novo on the administrative record, particularly under a statute rendering findings of the Administrator conclusive if supported by substantial evidence. Cf. Ellers v. R.R.B., 132 F. (2) 636, 639-640 (C.C.A. 2); South v. R.R.B., 131 F. (2) 748 (C.C.A. 5), cert. den. 317 U. S. 701.

Courts may not substitute their judgment even where the evidentiary facts are undisputed. In Gray v. Powell, 314 U. S. 402, 412, the court said:

> "Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director. * * * It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."[2]

The Social Security Administration, hearing the testimony and seeing the witnesses, clearly is in a more advantageous position to determine where the truth lies, and to it alone is committed the re-

[2]See also Boehn v. Com'r., 66 S. Ct. 120.

sponsibility of determining the weight of evidence and credibility of witnesses.

In Walker v. Altmeyer, 137 F. (2) 531 (C.C.A. 2) the district court in a proceeding under Section 205(g) of the Social Security Act reversed the administrative finding as to employment in a case where the individual, an attorney, continued to perform services after qualifying and so was subject to loss of benefits for months in which he rendered services for wages of $15 or more (Section 203(d)(1) of the Act, as amended, 42 U.S.C. 403 (d)(1). The Court of Appeals reinstated the Board's decision, saying (pp. 533-534):

> "The facts underlying that decision which were found on substantial evidence were, of course, binding upon the district court. That is not the question this appeal raises. The error into which the court fell was not that of making new and contrary findings but of substituting new and contrary inference of its own from the found facts which led it to reverse the administrative conclusion which had been reached as to the employee status of the plaintiff. That sort of action sent beyond the power of the district court to review in such a suit as this. It was the judgment of the administrative body as to an employer-employee relationship rather than that of the court which the statute made effective provided that judgment was based upon conclusions reasonably reached upon

> due consideration of all relevant issues presented after parties in interest had been given a fair hearing or a fair opportunity to be heard upon the facts and the applicable law. Gray v. Powell, 314 U. S. 402."

The establishment by Congress of an administrative authority with power to determine a particular question manifests an intention to rely on the expert judgment of a body "informed by experience." N.L.R.B. v. Hearst Publications, 322 U. S. 111, 130. The Social Security Administration in dealing daily with the old age and survivors insurance system and processing upwards of 2,000,000 insurance claims (See Blachly and Oatman, Judicial Review of Benefactory Action, 33 Geo. L. J. 1, 12, fa. 53) has developed a familiarity with the background and objectives of the Act, which cannot well be attained by a court in a single contact with a segment of a wage credit problem arising under the Social Security Act, in most instances under appealing circumstances inimical to the formulation of a workable general rule.

Decisions of the character involved herein go to the head of the Social Security Act. Affecting the minute details of administration, they belong uniquely to the expert tribunal established in the specialized field. There having been a fair hearing before the Social Security Administration, an opportunity for plaintiff to present his contentions to the administrative tribunal, application of the Act in a just and reasoned manner, and a rational

basis in the evidence to support the Administrator's conclusion, a court would exceed its authority if it should substitute its judgment for the judgment of the Administrator in the field entrusted to it by Congress. Rochester Tel. Corp v. United States, 307 U. S. 125; 146; Gray v. Powell, 314 U. S. 402; Dobson v. Com'r. 320 U. S. 489; Walker v. Altmeyer, 137 F. (2) 531 (C.C.A. 2); Social Security Board v. Warren, 142 F. (2) 974 (C.C.A. 8).

It is respectfully submitted that the motion of defendant for a summary judgment, and for judgment affirming the decision of the Federal Security Administrator should be granted.

/s/ JOHN A. CARVER,
United States Attorney.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney.
Attorneys for Defendant.

Of Counsel:

/s/ EDWARD H. HICKEY,
Special Assistant to the
Attorney General.

/s/ JAMES B. SPELL,
Attorney, Department of
Justice.

[Endorsed]: Filed December 3, 1948.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Archie F. McLean, Burley, Idaho.

Please take notice that the undersigned will bring the motion for summary judgment filed December 8, 1948, on for hearing before this Court, in the United States Courthouse, City of Boise, Idaho, on the 6th day of July, 1945, at 10 o'clock a.m., or as soon thereafter as counsel can be heard.

You are further notified that you are required to appoint another attorney to appear for you in this cause or you may appear in person to present this matter to the Court.

/s/ JOHN A. CARVER,
United States Attorney for
the District of Idaho.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for the District of Idaho,
Attorneys for Defendant.

I hereby certify that I have sent a true copy of the foregoing Notice to the plaintiff by mailing a copy thereof in envelope bearing Government frank, and addressed to him at Burley, Idaho, this 22nd day of June, 1949.

/s/ PAUL S. BOYD.

[Endorsed]: Filed June 22, 1949.

[Title of District Court and Cause.]

ORDER

At the request of the plaintiff herein it is Ordered that the amended complaint may be amended and the Clerk is directed to amend by interlineation, by inserting after the words "set forth," the last words in the first paragraph, the following: "and brings this action under the provisions of Title 42, subsection (g) of section 405 U.S.C.A."

Dated this 15th day of August, 1949.

/s/ CHASE A. CLARK,
United States District Judge.

[Endorsed]: Filed August 15, 1949.

[Title of District Court and Cause.]

ORDER

This matter came on for hearing on motion of the defendant for summary judgment, after hearing argument of counsel and considering the briefs filed, the Court is of the opinion that the rule laid down in the case of Miller v. Burger 161 Fed. (2) 992 is controlling here, therefore it is Ordered that the motion for Summary Judgment be and the same is denied.

Dated August 17, 1949.

/s/ CHASE A. CLARK,
United States District Judge.

[Endorsed]: Filed August 17, 1949.

In the District Court of the United States for the District of Idaho, Southern Division

Civil Action No. 2593

ARCHIE F. McLEAN,

Plaintiff,

vs.

OSCAR EWING, Federal Security Administrator,

Defendant.

JUDGMENT

This cause came on to be heard on the motion of the defendant for summary judgment and the court having considered the pleadings in the action and the certified copy of the Social Security Administration's record of the case, and the cause having been argued and considered by the court, the court finds that there is no genuine issue as to any material fact in the case and having concluded that the defendant's motion for summary judgment should be denied and that the plaintiff is entitled to judgment as a matter of law,

It Is Hereby Ordered, Adjudged and Decreed, That the defendant's motion for summary judgment be denied and that the decision of the Appeals Council of the Social Security Administration in this case, constituting the defendant's decision, be and the same is hereby reversed and the case is remanded to the Federal Security Administrator with directions to revise the wage records maintained by the Social Security Administration with

respect to the plaintiff's wages, so as to include in said wage records payments of salary to the plaintiff by Albert Miller and Company during the last calendar quarter of 1941 and during 1942, totaling $999.03, which payments of salary the Social Security Administration had excluded on the ground that the same was paid for services performed as "agricultural labor"; and upon such remand the Federal Security Administrator shall take further proceedings not inconsistent with this judgment.

Dated this 5th day of December, 1949.

/s/ CHASE A. CLARK,
United States District Judge.

[Endorsed]: Filed December 5, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendant-appellant above named hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain Judgment entered herein December 5, 1949.

/s/ JOHN A. CARVER,
United States Attorney for the District of Idaho.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for the District of Idaho.

[Endorsed]: Filed February 2, 1950.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME FOR FILING RECORD AND DOCKETING APPEAL

Defendant-appellant shows to the court as follows:

I.

Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit was filed herein on February 2, 1950.

II.

The Notice of Appeal was filed for the purpose of protecting the interests of the defendant-appellant until the Attorney General could determine if the appeal is to be perfected or dismissed.

III.

The Attorney General has not advised this office of its decision and the time for docketing in the Circuit Court will expire on March 14, 1950.

Wherefore, defendant-appellant moves the court for an order extending the time within which the record on appeal may be filed and the appeal docketed in the Circuit Court of Appeals until April 24, 1950.

/s/ JOHN A. CARVER,
United States Attorney for the District of Idaho.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for the District of Idaho.

ORDER

Upon motion of defendant-appellant, good cause appearing therefor,

It Is Ordered that the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is, extended to April 24, 1950.

Dated this 2nd day of March, 1950.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed March 3, 1950.

[Title of Court and Cause.]

MINUTES OF JULY 6, 1949

This cause came on regularly on defendant's Motion for Summary Judgment, S. T. Lowe representing the plaintiff and Paul S. Boyd representing the defendant.

After hearing counsel, the Court took the Motion under advisement and granted plaintiff 10 days to answer defendant's brief now on file and defendant 5 days to reply.

[Title of Court and Cause.]

MINUTES OF OCT. 21, 1949

This matter having been considered by the Court on a Motion for summary judgment and the Motion for summary judgment having been denied, and counsel for the respective parties having been advised that a date would be set for final disposition of the matter and the Court having fixed a date for such hearing on Friday the 28th day of October, 1949, at 1:30 p.m. and the Court being advised that an appeal has been taken to the United States Court of Appeals from the Order denying the Motion for summary judgement, the hearing set for Friday October 28th, 1949, will be and hereby is cancelled, vacated and set aside and this Court will take no further action in this matter until the appeal is disposed of or until Ordered so to do by the Court of Appeals.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint, filed August 31, 1948.
2. Motion, filed September 24, 1948.
3. Amended Complaint, filed October 30, 1948.
4. Answer, filed December 3, 1948.
5. Motion for Summary Judgment, filed December 3, 1948.
6. Notice of Motion, filed June 22, 1949.
7. Order of the court dated August 15, 1949, filed August 15, 1949.
8. Order of the court dated August 17, 1949, filed August 19, 1949.
9. Judgment of the court dated December 5, 1949, filed December 5, 1949.
10. Notice of Appeal, filed February 2, 1950.
11. Motion and Order Extending Time for Filing Record and Docketing Appeal dated March 2, 1950, filed March 3, 1950.
12. All minutes and records of the clerk.
13. Statement of Points upon which appellant intends to rely.
14. This designation of record and proof of service.

In preparing the above record, you will please omit the title on all pleadings filed in the cause except on the Complaint, and insert in lieu thereof

"Title of the court and cause" followed by the name of the pleading or instrument and the date of filing.

You will also omit the verifications and note in lieu thereof "duly verified" if the same be verified. You will also omit the acknowledgment of service on all pleadings and other documents.

/s/ JOHN A. CARVER,
United States Attorney for the District of Idaho.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for the District of Idaho.

I certify that a copy of the foregoing Designation of Record on Appeal was mailed to S. T. Lowe, plaintiff5s attorney, Burley, Idaho, on this 3d day of April, 1050.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for the District of Idaho.

[Endorsed]: Filed April 3, 1950.

[Title of District Court and Cause.]

AMENDED DESIGNATION OF RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action and

DefendaRnt-Appellant, pursuant to Rule 75(h) F.R.C.P., amends Designation of Record on Appeal filed April 3, 1950, to read as follows:

1. Complaint, filed August 31, 1948.
2. Motion, filed September 24, 1948.
3. Amended Complaint, filed October 30, 1948.
4. Answer, including transcript of administrative record filed December 3, 1948. The administrative record filed with Answer is to be printed as integral part of record on appeal.
5. Motion for Summary Judgment, filed December 3, 1948.
6. Notice of Motion, filed June 22, 1949.
7. Order of the court dated August 15, 1949, filed August 15, 1949.
8. Order of the court dated August 17, 1949, filed August 19, 1949.
9. Judgment of the courtd ated December 5, 1949, filed December 5, 1949.
10. Notice of Appeal, filed February 2, 1950.
11. Motion and Order Extending Time for Filing Record and Docketing Appeal dated March 2, 1950, filed March 3, 1950.
12. All minutes and records of the clerk.

13. Statement of Points upon which appellant intends to rely.

14. The Designation of Record on Appeal, filed April 3, 1950, and proof of service.

15. This Amended Designation of Record on Appeal and proof of service.

In preparing the above record, you will please omit the title on all pleadings filed in the cause except on the Complaint, and insert in lieu thereof "Title of the court and cause" followed by the name of the pleading or instrument and the date of filing. You will also omit the verifications and note in lieu thereof "duly verified" if the same be verified. You will also omit the acknowledgment of service on all pleadings and other documents.

/s/ JOHN A. CARVER,
United States Attorney for the District of Idaho.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for the District of Idaho.

I certify that a copy of the foregoing Amended Designation of Record on Appeal was mailed to S. T. Lowe, plaintiff's attorney, Burley, Idaho, on this 13th day of April, 1950.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for the District of Idaho.

[Endorsed]: Filed April 13, 1950.

[Title of Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the following papers are that portion of the original files as designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint, filed Aug. 31, 1948.
2. Motion, filed Sept. 24, 1948.
3. Amended Complaint, filed Oct. 30, 1948.
4. Answer, filed Dec. 3, 1948.
5. Motion for Summary Judgment, filed Dec. 3, 1948.
6. Notice of Motion, filed June 22, 1948.
7. Order, filed Aug. 15, 1949.
8. Order, filed Aug. 17, 1949.
9. Judgment, filed Dec. 5, 1949.
10. Notice of Appeal, filed Feb. 2, 1950.
11. Motion and Order Extending Time for Filing Record and Docketing Appeal, filed Mar. 3, 1950.
12. Minutes of the Court of July 6, 1949, and Oct. 21, 1949.
13. Designation of Record on Appeal, filed Apr. 3, 1950.
14. Amended Designation of Record on Appeal, filed Apr. 13, 1950.

(The original Statement of Points as requested in the Designation of Record on Appeal, Item 13, was filed in the Circuit Court and not in the District Court and, therefore, is not included in this transcript.)

In Witness Whereof, I have hereunto set my hand and affixed the seal of this court, this 14th day of April, 1950.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 12523. United States Court of Appeals for the Ninth Circuit. Oscar Ewing, Federal Security Administrator, Appellant, vs. Archie F. McLean, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed April 17, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

OSCAR EWING, Federal Security Administrator,
Appellant,

vs.

ARCHIE F. McLEAN,
Appellee.

STATEMENT OF POINTS UNDER RULE 19

Comes Now the above-named appellant and files its statement of points on which it will rely on the appeal of this matter:

I.

The court erred in failing to hold that the services performed by the wage earner, Archie F. McLean, for Albert Miller & Company, a Chicago corporation, at its Burley, Idaho, warehouse were properly considered by the Federal Security Administrator to be "agricultural labor" as defined in Section 209 (1)(4) of the Social Security Act, as amended (42 U.S.C. 409 (1)(4) and in the corresponding tax statute, Chapter 9A of the Internal Revenue Code, 26 U.S.C. 1426(h)(4) so that the payments he received therefor during the last calendar quarter of 1941 and during 1942 were properly excluded from wage credits.

II.

The court erred in failing to hold that plaintiff's services were performed prior to the delivery of

the potatoes to a terminal market and as an incident to the preparation of such potatoes for market.

III.

The court erred in holding that the Burley, Idaho, warehouse of Albert Miller & Co. was a terminal market for distribution for consumption.

IV.

The court rered in holding that the plaintiff's services were performed after the potatoes had reached the (a) grower's market or (b) the terminal market.

V.

The court erred in failing to hold that the washing, sorting and grading operations performed by plaintiff at the Burley, Idaho, warehouse were performed as an incident to the preparation of such potatoes for market within the meaning of Section 209(1)(4) of the Social Security Act, as amended by 53 Stat. 1377, and within the meaning of the Social Security Administration Regulations 3, Part 403, Title 20 C.F.R. Sec. 403.808(e).

VI.

The court erred in concluding that the decision of the Ninth Circuit Court of Appeals in Miller v. Burger, 161 F. (2d) 992, dealing with the workers of a commercial handler purchasing fruit outright, is controlling here, where the washing, sorting and grading of the potatoes was incident to their preparation for market and was necessarily performed by plaintiff as the statutory agent of the

farmer grower prior to completion of which operations title to the potatoes remained in the farmer grower.

VII.

The court erred in substituting its own views of "agricultural labor" for the statutory definition adopted by Congress for Title II of the Social Security Act and corresponding tax provisions.

VIII.

The court erred in disregarding the Federal Security Administrator's findings and finding independently and without support in the record that when the Burley, Idaho, warehouse of Albert Miller & Co. received the unwashed, unsorted and ungraded potatoes that they were then in a merchantable state and that the farmer growers had parted with all economic interest and title therein.

IX.

The court erred in holding that the Social Security Act makes no distinction between the farmer growers of fresh vegetables and the commercial handlers thereof, insofar as the latter performs for such farmer-grower services incident to the preparation of such vegetables for market (a) thereby nullifying the exception of services such as washing, sorting and grading, incident to the preparation of vegetables for market, without regard to the Congressional purpose as established by the legislative history of the 1939 amendments to the Social Security Act and to the respect due the ex-

pertness of the Federal Security Administrator, and (b) invalidating the Regulations promulgated by the Social Security Administration.

X.

The court erred in holding that Albert Miller & Co. was not the statutory agent of the farmer grower for the performance of the washing, sorting and grading operations.

XI.

The court erred in denying defendant's motion for summary judgment and in reversing and remanding the cause.

/s/ JOHN A. CARVER,
United States Attorney for the District of Idaho.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for the District of Idaho.

[Endorsed]: Filed April 17, 1950.

[Title of Court of Appeals and Cause.]

ADOPTION OF POINTS AND DESIGNATION OF RECORD FOR PRINTING

Comes Now the above-named appellant and, in compliance with Rule 19, Subdivision 6, hereby adopts as its points the Statement of Points filed in the Circuit Court of Appeals for the Ninth Circuit and appellant hereby designates the entire transcript of record and Statement of Points for printing as provided in said rule.

/s/ JOHN A. CARVER,
United States Attorney for the District of Idaho.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for the District of Idaho.

I certify that a copy of the foregoing Adoption of Points and Designation of Record for Printing was mailed to S. T. Lowe, plaintiff's attorney, Burley, Idaho, on this 25th day of April, 1950.

/s/ PAUL S. BOYD,
Assistant U. S. Attorney for the District of Idaho.

[Endorsed]: Filed April 28, 1950.